U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 21 October 2003

In the Matter of:	:	
	:	
PRESTON H. ALLEN,	:	Case Number: 2002-BLA-395
Claimant,	:	
	:	
v.	:	
	:	
L & M TRUCKING,	:	
Employer,	:	
	:	
and	:	
	:	
SOUTHEAST ENERGY CORPORATION	:	
Employer	:	
	:	
and	:	
	:	
WRIGHT MINING COMPANY	:	
Employer	:	
	:	
and	:	
	:	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,	:	
Party-in-Interest.	:	

Ron Carson
For the Claimant

Joseph Bowman, Esquire
For the Respondent

Before: EDWARD TERHUNE MILLER
Administrative Law Judge

DECISION AND ORDER - REJECTION OF CLAIM

Statement of the Case

This proceeding involves a request for modification of a claim for benefits under the Black Lung Benefits Act as amended, 30 U.S.C. §§901 *et seq*. ("the Act"), and the regulations promulgated thereunder.[1] Since this claim was filed after March 31, 1980, Part 718 applies. §718.2. Because the Claimant Miner was last employed in the coal industry in Virginia, the law of the United States Court of Appeals for the Fourth Circuit controls (D-4). *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

Procedural History

Preston Allen, (the "Claimant") filed his initial claim for benefits under the Act on June 9, 1970. (D-1[1]) On April 6, 1978, Claimant requested that the Social Security Administration ("SSA") review his claim, which had been denied by the SSA on February 5, 1971, and November 15, 1973, because he had not proved the existence of pneumoconiosis. (D-1 [26-29]) The claim was reviewed by SSA pursuant to the 1977 amendments to the Act on October 3, 1978 and February 7, 1979, denied, and transferred to the Department of Labor. (D-1 [30-31]) On January 22, 1980, and again after submission and review of additional evidence on August 29, 1980, the Director denied benefits because Claimant had not established the existence of pneumoconiosis caused by coal mine work or disability caused by pneumoconiosis. (D-1 [32, 34]) The Deputy Commissioner ruled separately on September 25, 1982, that L & M Trucking Co. was relieved of liability as the responsible operator because the 1981 amendments to the Act transferred liability to the Black Lung Disability Trust Fund. (D-44) Following an informal conference with the Deputy Commissioner, now called the District Director, Claimant requested a formal hearing before the Office of Administrative Law Judges on April 5, 1984. (D-1 [41,42]) The claim was referred for hearing on June 8, 1984. The hearing was held before Judge Ellen M. O'Shea on August 14, 1986. In a decision and order dated February 2, 1987, Judge O'Shea denied benefits because Claimant had not proved that he had pneumoconiosis or that he was totally disabled due to pneumoconiosis. Claimant appealed on February 27, 1987, and on September 19, 1989, the Benefits Review Board affirmed. (D-1).

The Claimant filed his first duplicate claim on April 7, 1994 (D-2). The Director designated L & M Trucking Co. as the putative responsible operator. The District Director denied the claim on September 15, 1994, on the grounds that Claimant had not proved the existence of pneumoconiosis, its causation by coal mine employment, total disability caused by pneumoconiosis, or a material

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[1] All applicable regulations which are cited are included in Title 20, Code of Federal Regulations, unless otherwise indicated, and are cited by part or section only. Claimant's Exhibits are denoted "C-"; Director's Exhibits, "D-"; Employer's Exhibits, "E-"; and citations to the hearing transcript are denoted "Tr." Where a multipage exhibit retains the Director's prior exhibit numbers, they are indicated within brackets [].

change in conditions. Claimant requested a hearing before the Office of Administrative Law Judges on September 27, 1994 (D-2). However, an informal conference was conducted on January 25, 1995, by the District Director, who denied the claim in a Proposed Decision and Order, Memorandum of Conference, dated February 10, 1995, on the grounds that the medical elements of entitlement had not been established, and that the evidence did not establish that the Miner is totally disabled by pneumoconiosis arising out of his coal mine employment, or that there had been a material change in condition since the prior final decision. (D-2) There was no appeal, and the denial became final thirty days after its issuance in accordance with its terms.

On October 12, 2000, Claimant filed his second duplicate claim (D-3). The District Director denied that claim on December 21, 2000 (D-16). Claimant filed a request for modification on December 12, 2001 (D-20). On April 17, 2002, the Claimant requested a formal hearing before an Administrative Law Judge, the claim was forwarded, and the hearing was held on December 17, 2002 (D-27).

Issues

1. Whether the Claimant has proved the existence of a change of conditions since the denial of his claim on February 10, 1995, or a mistake in a determination of fact?
2. Whether the Claimant has pneumoconiosis?
3. Whether the Claimant's pneumoconiosis, if proved, arose out of his coal mine employment?
4. Whether the Claimant is totally disabled by a respiratory or pulmonary impairment?
5. Whether the Claimant's total disability, if proved, is due to coal workers' pneumoconiosis?

Findings of Fact

Benefits under the Act are awardable to persons who are totally disabled due to pneumoconiosis within the meaning of the Act. For the purposes of the Act, pneumoconiosis, commonly known as black lung, means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. It includes diseases recognized by the medical community as pneumoconioses, as well as any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. A disease arising out of coal mine employment includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. §718.201. In order to obtain federal black lung benefits, a claimant miner must prove by a preponderance of the evidence that: "(1) he has pneumoconiosis; (2) the pneumoconiosis arose out of his coal mine employment; (3) he has a totally disabling respiratory or pulmonary condition; and (4) pneumoconiosis is a contributing cause of his total respiratory disability." *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 529, 21 B.L.R. 2-323 (4th Cir. 1998); *see Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1195, 19 B.L.R. 2-304 (4th Cir. 1995); 20 CFR §§718.201-.204 (1999); *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986).

Background

Claimant was born on July 19, 1916, and his education ended with completion of the fourth grade. (D-3). Judge O'Shea found, and the Benefits Review Board affirmed, that the Claimant completed thirty-two years of coal mine employment (D-1). The evidence of record supports Judge O'Shea's finding (D-30). The Claimant last worked in the coal mine industry in 1977 as a truck driver (D-4). The identity of the responsible employer is moot, because Claimant has not established a change in conditions or a mistake in a determination of fact as the conditions precedent to a modification of the prior denial. There are no dependents for purposes of augmentation of benefits under the Act.

Modification: Change in Conditions or Mistake in a Determination of Fact

Section 725.310 provides that any party may request modification of an award or denial of benefits if such request is filed within one year of the denial alleging a change in conditions or mistake in a determination of fact. Where mistake in a determination of fact forms the grounds for the modification request, new evidence is not a prerequisite, and a mistake in a determination of fact may be corrected whether demonstrated by new evidence, cumulative evidence, or further reflection on evidence initially submitted. *Kovac v. BCNR Mining Corporation,* 16 B.L.R. 1071 (1992), *modifying* 14 B.L.R. 1-156 (1990). If no specific mistake is alleged, but the ultimate determination regarding entitlement is challenged, the entire record must be examined for a mistake in a determination of fact. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 B.L.R. 2-26 (4th Cir. 1993). The administrative law judge, as trier-of-fact, has the authority, and the duty, to review the evidence of record *de novo* and is bound to consider the entirety of the evidentiary record, not merely the newly submitted evidence, in making the finding upon modification. *See Nataloni v. Director, OWCP*, 17 B.L.R. 1-82, 1-84 (1993); *Kovac v. BCNR Mining Corp.*, 14 B.L.R. 1-156 (1990), *modified on reconsideration*, 16 B.L.R. 1-71 (1992); *see also Jessee*, 5 F.3d at 725, 18 B.L.R. at 2-28; *see generally, O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971).

Change in conditions focuses on whether there has been a change of the miner's condition. In determining whether a change in conditions has occurred, an Administrative Law Judge must "perform an independent assessment of the newly submitted evidence, in conjunction with evidence previously submitted, to determine if the weight of the new evidence is sufficient to establish the element or elements which defeated entitlement in the prior decision." *See Nataloni v. Director. OWCP*, 17 B.L.R. 1-82, 1-84 (1993); *Kingery v. Hunt Branch Coal Co.*, 19 B.L.R. 1-6 (1994); *Napier v. Director, OWCP*, 17 B.L.R. 1-111 (1993).

Claimant has expressly requested a modification based on a change in conditions (D-20). In addition, the record has been reviewed for possible mistake in a determination of fact. Judge O'Shea, in the February 2, 1987 denial of benefits, found that Claimant was not totally disabled by pneumoconiosis. Having reviewed the evidence before Judge O'Shea prior to the February 2, 1987, denial, this tribunal has determined that Judge O'Shea correctly found that Claimant did not

establish any of the elements required to prove entitlement to benefits. (D-1). The evidence relevant to the claim that was before the Director consisted of the following: x-ray interpretations of various films dated from July 28, 1973 to January 13, 1984, all of which were negative, 0/0; three arterial blood gas studies dated from May 31, 1979 to September 11, 1981, one of which was qualifying, but that reading was invalidated by Dr. McQuillen; four pulmonary function studies dated from July 17, 1973 to September 11, 1981, all nonqualifying; and the medical opinions of Drs. Shine, Taylor, and Dahhan. Both Dr. Dahhan and Dr. Shine opined that Claimant did not have pneumoconiosis. Dr. Taylor's equivocal conclusion was that, despite the negative x-ray interpretation by Dr. Navani, an abnormal MVV result from the pulmonary function study, and blood gas test results disclosing mild hypoxemia with mild CO2 retention, there was indicated "some restricted pulmonary disease, the nature of which at this time is difficult to determine or ascertain secondary to the normal chest x ray, but I feel that with 32 years of exposure to the mines that it must be related to the dust that he has breathed during this period of time, and therefore I think that we can reasonably assume that this is a compensatory lung problem." (D-1). The abnormal MVV test result, however, was invalidated by Dr. McQuillen. Thus, Judge O'Shea correctly concluded that Claimant had not proved by a preponderance of the evidence that he was permanently disabled by pneumoconiosis. Judge O'Shea concluded that Claimant did not have pneumoconiosis pursuant to Parts 727 and 410. Because review of the evidence of record has disclosed no mistake in a determination of fact, Claimant's request for modification, to the extent it is based on a mistake in a determination of fact, must be denied. Similarly, there is no mistake in a determination of fact related to the subsequent duplicate claim denied by the District Director on February 10, 1995.

Evidence Submitted Since the Denial of Claimant's Duplicate Claim on February 10, 1995

X-ray Evidence[2]

Exh. No.	X-ray Date	Physician	Qualifications	Film Quality	Interpretation
D-22	4/5/00	Illegible sig.	R, B	2	0/0

[2] The following abbreviations are used in describing the qualifications of the physicians: B-reader, "B"; board-certified radiologist, "R". An interpretation of "0/0"signifies that the film was read completely negative for pneumoconiosis. Where a doctor's qualifications are not disclosed by the record, this tribunal has taken judicial notice of those qualifications by reference to the worldwide web, American Board of Medical Specialties, Who's Certified Results, at http://www.abms.org, and the List of NIOSH Approved B Readers, found, *inter alia*, at http://www.oalj.dol.gov/libbla.htm. *See Maddaleni v. Pittsburgh & Midway Coal Mining Co.*, 14 B.L.R. 1-135 (1990).

Exh. No.	X-ray Date	Physician	Qualifications	Film Quality	Interpretation
D-20	4/5/00	Alexander	R, B	3	1/1[3]
E-1	4/5/00	Wheeler	R, B	2	0/0
D-14	11/15/00	Paranthaman	B	2	0/1
D-15	11/15/00	Sargent	R, B	2	0/0
E-1	11/15/00	Wheeler	R, B	2	0/0
D-20	9/18/01	Ahmed	R, B	2	1/1, s/p
D-23	9/18/01	Navani	R, B	2	0/0
E-1	9/18/01	Wheeler	R, B	2	0/0
E-3	10/21/02	Dahhan	R, B	1	0/0

Pulmonary Function Studies[4]

Exh. No	Test Date	Age/ Ht	Doctor	Co-op /Unds.	Conf.	FEV_1	FVC	MVV	Qualify
D-11	11/15/00	84/66"	Paranthaman	Good/ Good	Yes	1.25 1.50	1.96 2.19	53 65	Yes[5] No
D-20	1/8/01	84/ 67"	Craven	Good/ Good	No	1.66	2.55	50	No
C-1	7/16/02	86/ 67"	Smiddy	Good/ Good	Yes	1.31	2.78	?	No[6]

[3] Dr. Alexander noted that a better quality film needs to be obtained for a more accurate assessment.

[4] The second set of values indicate post-bronchodilator studies.

[5] Dr. Michos opined that the results were acceptable on December 14, 2000.

[6] Dr. Smiddy noted that Claimant had clear lung fields and "calcification of the aorta." He diagnosed Claimant with coal worker's pneumoconiosis, COPD, with the possibility of "occult asthma."

Exh. No	Test Date	Age/ Ht	Doctor	Co-op /Unds.	Conf.	FEV_1	FVC	MVV	Qualify
E-3	10/21/02	86/ 168cm	Dahhan	Good/ Good	Yes	1.95 1.99	2.62 2.68	26 32	No No

Arterial Blood Gas Studies

Exh. No.	Test Date	Physician	Conform?	pO_2	pCO_2	Qualifying
D-10	11/15/00	Paranthaman	Yes	74	40	No
E-3	10/21/02	Dahhan	No[7]	88.3	29.6	No

Medical Reports and Opinions

Dr. S.K. Paranthaman

Dr. Paranthaman examined Claimant on November 15, 2000, and opined that Claimant had asthmatic bronchitis that was of a one year duration, and that it was unlikely to be related to coal mine employment he had quit in 1977. Dr. Paranthaman did not diagnose Claimant with either legal or clinical pneumoconiosis, even though Claimant had worked as a coal miner for thirty-two years. Based on the post-bronchodilator values in the pulmonary function study and the resting blood gas values, Dr. Paranthaman opined that Claimant's respiratory impairment was moderate, and that he was not totally disabled by his respiratory impairment, but that Claimant's disability caused by heart disease precluded him from heavy labor. Dr. Paranthaman's conclusion that Claimant did not suffer from pneumoconiosis and was not totally impaired by any pulmonary or respiratory disease was consistent with the medical test results that he performed and pertinent x-ray readings. (D-9)

Dr. Lawrence J. Fleenor, Jr.

In a letter dated September 25, 2001, responding to partially disclosed questions, Dr. Fleenor, who is board-certified in family practice and is a B-reader, declared that he had first seen the Claimant on April 25, 2001, that Claimant had a respiratory impairment due in part to coal dust exposure, and that the impairment was significant in that it hindered his capacity to perform his activities of daily living. Dr. Fleenor expressly based his insubstantial opinion on Dr. Michael

[7] No altitude noted.

Alexander's interpretation of an x-ray dated February 18, 2001, as 1/1 P/P Coal Workers' Pneumoconiosis, and the fact that the patient "was on" and "required...numerous...typical respiratory medications" of which Dr. Fleenor had been informed. He did not expressly rely upon his examination of Claimant on April 25, 2001. Dr. Fleenor did not state whether Claimant had pneumoconiosis, except to the extent that such a conclusion might be inferred from his reference to Dr. Alexander's x-ray interpretation, or whether Claimant was totally disabled due to pneumoconiosis. (D-20).

In a second letter dated November 26, 2002, responding to the form letter from Dr. Bickley Craven at Stone Mountain Health Services, Dr. Fleenor opined that Claimant had a respiratory impairment. Dr. Fleenor indicated that he had first seen the Claimant on April 25, 2001; that Claimant had showed him Dr. Alexander's x-ray interpretation of 1/1 P/T [sic] Coal Workers' Pneumoconiosis, and that of another unidentified doctor, 1/1 S Pneumoconiosis, and that he had referred Claimant to Dr. Smiddy, who said he has Coal Workers' Pneumoconiosis. Dr. Fleenor stated that he was treating Claimant for breathing problems. He identified three medications and a need for antibiotics for "intercurrent pulmonary infections," but disclaimed knowledge of work history or issues of daily living. He did not opine that Claimant had pneumoconiosis or that Claimant was totally impaired due to pneumoconiosis. (C-6). Progress notes recorded by Dr. Fleenor dated from February 27, 2002 through October 29, 2002, are mostly illegible and essentially unintelligible without interpretation (C-7).

Dr. Joseph F. Smiddy

In a letter to Dr. Fleenor dated May 2, 2002, Dr. Smiddy, who is board-certified in internal medicine and is board-eligible in the subspecialty of pulmonary disease, briefly summarized Claimant's medical history in relevant part as positive for emphysema, bronchitis, heart disease, stroke, congestive heart failure, and repeated bouts of bronchitis. Dr. Smiddy diagnosed Claimant with coal workers' pneumoconiosis, chronic bronchitis, chronic obstructive pulmonary disease, and other infirmities, but disclosed no documented or reasoned basis for these conclusion. His initial assessment was of an eighty-five year old man in seriously declining health. Dr. Smiddy did not assess the particular causes of Claimant's apparent disability. (C-3).

In a progress note dated July 11, 2002, Dr. Smiddy diagnosed coal workers' pneumoconiosis, possible remote history of asthma, and weight loss. Claimant was scheduled for a pulmonary function test and a chest x-ray. Dr. Smiddy noted that Claimant had "some chronic shortness of breath, exercise limitation and reduced appetite," but provided no documentation or reasons for his conclusion that Claimant had coal workers' pneumoconiosis. (C-2).

In a progress note dated July 25, 2002, Dr. Smiddy diagnosed coal workers' pneumoconiosis, possible occult asthma, and COPD, after examining Claimant, reviewing an x-ray dated July 16, 2002, and noting that the results of a pulmonary function test, conducted on July 16, 2002, showed a severe obstructive ventilatory defect. The chest x-ray was interpreted as showing clear lung fields. Dr. Smiddy's findings are not documented or explained, and he did not relate the

COPD to coal mine employment. (C-1).

Dr. Thomas M. Bulle

In a medical report dated April 13, 2000, Dr. Bulle, who is board-certified in internal medicine and the subspecialty of cardiovascular disease, examined Claimant on reference by Dr. Molony. Dr. Bulle noted that Claimant was eighty-three with chronic wheezing and deterioration of valvular left ventricular function, and a history of COPD that had been quite severe, bronchospasm, chronic bronchitis, and adult onset asthma. He noted that Claimant chewed tobacco, but never smoked. Dr. Bulle diagnosed Claimant with a combined obstructive and restrictive defect that he apparently based on a pulmonary function study by a Dr. Foster earlier in the month. Based on a physical examination, Dr. Bulle diagnosed Claimant with dyspnea, with chronic obstructive pulmonary disease and asthma, and cardiac problems. Dr. Bulle did not refer to particular medical tests or the physical examination in making his diagnoses, although he obviously relied generally upon certain medical records and reports. He did not relate Claimant's COPD to coal mining or state whether the COPD was disabling. (D-20).

In two short notes directed subsequently to Dr. Molony dated May 3, 2000 and June 8, 2000, Dr. Bulle noted that Claimant had a minimum of moderate chronic obstructive lung disease, mild renal insufficiency, and cerebrovascular insufficiency, and that his lungs were relatively clear with some minor crackles and very mild forced expiratory wheezes at the base. Again he did not link the lung disease to coal mine work or disability. (D-20). In a short medical report dated July 27, 2000, Dr. Bulle noted that Claimant had various cardiac and other problems, including COPD and asthma. Upon physical examination of Claimant, Dr. Bulle noted that Claimant's lungs were largely clear with some scattered, faint crackles, and no rales or wheezes, and that there was no cough or sputum production. He diagnosed Claimant with stable angina, class III, and coronary artery disease, but made no mention of medical pneumoconiosis and did not link the COPD to any coal mining work. He did not comment on whether Claimant had the ability to perform his last coal mining job. No testing was described. (D-20).

In a medical report dated December 13, 2000, Dr. Bulle noted that Claimant had applied for black lung benefits. Dr. Bulle had performed a physical examination and echocardiogram. His impressions included coronary artery disease, chronic obstructive pulmonary disease, questionable asthma, coal worker's pneumoconiosis, possible " right heart failure," and aortic and mitral valve disease. Dr. Bulle did not assess disability or causation of the COPD. (D-20). In a letter of even date, responding to questions posed by Stone Mountain Health Service on August 29, Dr. Bulle declared that Claimant has a respiratory impairment related to his COPD and heart failure. Dr. Bulle opined that the symptoms could be due at least in part to coal dust exposure from his work history. Dr. Bulle stated that, while he had been treating Claimant since April, he managed Claimant's heart failure, but he did not personally treat Claimant's respiratory impairment. Dr. Bulle opined only that Claimant's breathing impairment limited his activities of daily living due to dyspnea. (D-20).

In another short progress note to Dr. Patrick Molony dated December 27, 2001, Dr. Bulle noted, after examining Claimant, that Claimant complained of a "perpetual shortness of breath," that his chest was clear, and recorded impressions, *inter alia*, of coronary artery and other cardiac disease, stable chronic obstructive pulmonary disease and asthma, mitral and aortic valve disease, and other abnormalities. He made no reference to pneumoconiosis or disability related thereto. (C-5) In a brief progress note to Dr. Fleenor dated August 20, 2002, following an examination, Dr. Bulle recorded impressions, *inter alia*, of severe chronic obstructive lung disease. He also referred to 'some element of congestive heart failure." Dr. Bulle recorded that Claimant's chest had diminished breath sounds, but was otherwise clear with normal effort. Again there was no reference to pneumoconiosis or related impairment. (C-4).

Dr. Abdul K. Dahhan

In a medical report dated November 1, 2002, Dr. Dahhan, who is board-certified in internal medicine and the subspecialty of pulmonary disease, and is a B-reader, reviewed specified medical reports, x-rays, pulmonary function studies, and arterial blood gas studies from 1973 to 2002. After examining Claimant, Dr. Dahhan noted that Claimant was an eighty-six year old, non-smoker, with thirty-two years of coal mine employment as an underground shuttle car operator and dozer man. Dr. Dahhan noted that Claimant was a nonsmoker with a history of a daily cough, with occasional wheeze and very little sputum, mini-strokes, and "possible Alzheimer's Disease." Claimant's chest examination showed good air entry to both lungs "with no crepitation, rhonchi[,] or wheeze" and his cardiac examination revealed abnormal heart sounds due to "bundle branch block" with no "gallops or murmurs" detected.

Dr. Dahhan concluded that there were insufficient objective findings to justify the diagnosis of coal workers' pneumoconiosis based on the normal clinical examination of the chest, normal blood gases, normal pulmonary function studies, and negative x-ray reading for pneumoconiosis. His findings did not indicate total or permanent disability "based on the clinical and physiologic parameters of Claimant's respiratory system." Dr. Dahhan opined that Claimant's respiratory system retained "the physiological capacity to continue his previous coal mining work or job of comparable physical demand with no evidence of pulmonary impairment caused by, related to, contributed to or aggravated by the inhalation of coal dust or coal workers' pneumoconiosis." Dr. Dahhan opined that even with radiological evidence of pneumoconiosis, from a functional respiratory standpoint, Claimant retained the physiological capacity to "continue his previous coal mining work or job of comparable physical demand." Dr. Dahhan concluded that Claimant has "a history of Alzheimer's Disease, coronary artery disease, left bundle branch block, congestive heart failure, mini-strokes, hyperlipidemia, arthritis and peptic ulcer disease," and all of these diseases are "conditions of the general public at large and are not caused by, related to, contributed to or aggravated by the inhalation of coal dust or coal workers' pneumoconiosis." (E-3)

Conclusions of Law and Discussion

Change in Conditions

Claimant alleges that he has experienced a change in conditions since the prior denial of his claim such that he has pneumoconiosis caused by coal mining and is totally disabled by pneumoconiosis, and so is entitled to black lung benefits. Since he has not established that he has pneumoconiosis or that he is totally disabled by a respiratory or pulmonary impairment or by pneumoconiosis, he has not established a change in conditions as the basis for a modification of the previous denial.

Existence of Pneumoconiosis

For the purposes of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising from coal mine employment. This definition includes both medical, or "clinical," pneumoconiosis and statutory, or "legal," pneumoconiosis. §718.201. Section 718.202(a) prescribes four bases for finding the existence of pneumoconiosis: (1) a properly conducted and reported chest x-ray; (2) a properly conducted and reported biopsy or autopsy; (3) reliance upon certain presumptions which are set forth in §§718.304, 718.305, and 718.306; or (4) the finding by a physician of pneumoconiosis as defined in §718.201 which is based upon objective evidence and a reasoned medical opinion. Since the record contains no evidence of a biopsy or autopsy, the existence of pneumoconiosis cannot be established under §718.202(a)(2). Since there is no evidence that Claimant suffers from complicated pneumoconiosis, the presumption set forth in §718.304 is inapplicable. Since the claim was filed after January 1, 1982, and since this is not a survivor's claim, the presumptions set forth in §§718.305 and 718.306 are inapplicable as well.

The existence of pneumoconiosis requires consideration of "all relevant evidence" under §718.202(a), as specified in the Act. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 2000 WL 524798 (4th Cir. 2000). There are within the inventory of new evidence ten interpretations of four chest x-rays. Of the ten x-ray readings, two were read as positive for pneumoconiosis, but one was of such poor quality that Dr. Alexander stated that he needed a better quality x-ray to make a more accurate assessment (D-14, 20). The other, read as positive, 1/1, by Dr. Ahmed, was read as negative by two other doctors who were also board-certified radiologists and B-readers. (E-3). All doctors interpreting the x-rays were board-certified radiologists and B-readers except Dr. Paranthaman, a B reader. Dr. Paranthaman's interpretation, 0/1, does not constitute evidence of pneumoconiosis. §718.102(b) The most recent x-ray, read as negative, was not reread. Given the overwhelming preponderance of negative readings of the x-rays submitted since the last denial of benefits, this tribunal concludes that the radiographic evidence does not establish that the Claimant has pneumoconiosis under §718.202(a)(1).

Pursuant to §718.104(d), this tribunal is required to give consideration with respect to certain enumerated factors to the relationship between a miner and any treating physician whose report is admitted into the record. Section 718.104(d)(5) provides that, in appropriate cases, the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudicating officer's decision to give that physician's opinion controlling weight, provided that the weight also be based on the credibility of the physician's opinion in light of its reasoning and

documentation, other relevant evidence, and the record as a whole. At the hearing, Claimant testified that Drs. Fleenor and Smiddy were treating him for "black lung" and "breathing," and that Dr. Fleenor had treated him from February to October of 2002 (Tr. 20-22, C-7). In addition, Claimant testified that Dr. Bulle was his "heart doctor" and that he received treatment from Dr. Bulle every few months (Tr. 21). The doctors' reports provided little additional evidence regarding their respective relationships with the Claimant or the nature and extent of their respective treatments. Based on Claimant's testimony and the limited evidence of Drs. Fleenor's, Smiddy's, and Bulle's respective treatments of the Claimant, Drs. Fleenor and Bulle are deemed to qualify as Claimant's treating physicians under §718.104(d). Dr. Smiddy does not qualify as a treating physician because he only examined Claimant at the request of Dr. Fleenor and there is no evidence that he treated Claimant. However, in any event, the credibility of these doctors' opinions is substantially outweighed by the credibility of the documented and reasoned opinion of Dr. Dahhan and the opinion of Dr. Paranthaman, both of which are supported by medical evidence. Drs. Fleenor, Bulle, and Smiddy opined that Claimant had pneumoconiosis, but they did not support their respective diagnoses with particular medical evidence, references to objective testing, or explicit reasoning. Dr. Bulle's diagnosis of pneumoconiosis was equivocal, and his diagnosis of pulmonary disease was not attributed to coal mining. Both Dr. Dahhan and Dr. Paranthaman have superior credentials to those of Drs. Fleenor, Bulle, and Smiddy, because they are board-certified in internal medicine and the subspecialty of pulmonary diseases, and are B-readers. Drs. Smiddy and Bulle are board-certified in internal medicine; Dr. Smiddy is only board-eligible in the subspecialty of pulmonary disease; and Dr. Bulle is board-certified in the subspecialty of cardiovascular disease, not the subspecialty of pulmonary disease. Dr. Fleenor is board-certified in family practice, not pulmonary disease, though he is a B-reader. Thus, a preponderance of the evidence provided by reasoned, objectively based physicians' opinions does not establish the existence of pneumoconiosis.

Causation

A claimant must establish that his pneumoconiosis arose, at least in part, out of his coal mine employment. Pursuant to §718.203(b), a claimant is entitled to a rebuttable presumption of a causal relationship between his pneumoconiosis and his coal mine employment if he worked for at least ten years as a coal miner. In the instant case, Claimant established at least ten years of coal mine employment. But, because Claimant is held not to have established the existence of pneumoconiosis, the issue is moot.

Disability Due to Pneumoconiosis

To establish total disability, Claimant must prove that he is unable to engage in either his usual coal mine work or comparable and gainful work as defined in §718.204. Section 718.204(b)(2) provides that the criteria for determining whether a miner is totally disabled are: (1) pulmonary function tests qualifying under applicable regulatory standards; (2) arterial blood gas studies qualifying under applicable regulatory standards; (3) proof of pneumoconiosis and cor pulmonale with right sided congestive heart failure; or (4) proof of a disabling respiratory or pulmonary condition on the basis of the reasoned medical opinion of a physician relying upon

medically acceptable clinical and laboratory diagnostic techniques. If there is contrary evidence in the record, all the evidence must be weighed in determining whether there is proof by a preponderance of the evidence that the miner is totally disabled by pneumoconiosis. *Shedlock v. Bethlehem Mines. Corp.*, 9 B.L.R. 1-95 (1986).

Included in the new evidence are four pulmonary function studies. Three of the studies produced nonqualifying results. The oldest study produced a qualifying result without bronchodilators, but the post-bronchodilator study was qualifying. Therefore, a preponderance of the pulmonary function study results does not establish total disability pursuant to §718.204(b)(2)(i). Two arterial blood gas studies which were new evidence, one of which was nonconforming, produced nonqualifying results. Therefore the arterial blood gas studies do not establish total disability pursuant to §718.204(b)(2)(ii) (E-3). Since there is no evidence of cor pulmonale with right-sided congestive heart failure, Claimant has not proved total disability pursuant to Section 718.204(b)(2)(iii).

The medical opinions of the physicians who examined Claimant and reviewed additional medical evidence also do not establish that the Claimant is totally disabled by a respiratory or pulmonary impairment pursuant to §718.204(b)(2)(iv). Of the five physicians who opined of record, only Dr. Fleenor opined that Claimant was partially disabled due to his respiratory impairment due to coal mine dust. Drs. Bulle and Smiddy did not comment on Claimant's ability to perform his last coal mining job, and Drs. Dahhan and Paranthaman opined that, from a respiratory and pulmonary standpoint, Claimant would be able to perform his last coal mining job. Drs. Bulle, Smiddy, and Fleenor did not opine that Claimant was totally disabled. Only Drs. Dahhan and Paranthaman opined that Claimant was totally disabled, but not by a respiratory or pulmonary impairment. Dr. Dahhan's opinion is the best documented and reasoned. Accordingly, because the preponderance of the evidence under §718.204(b)(iv) indicates that the Claimant is not totally disabled by a pulmonary or respiratory impairment, and because the preponderance of the objective evidence under §718.204(b) corroborates and is consistent with that evidence, Claimant has not established that he is totally disabled by a respiratory of pulmonary impairment.

Total Disability Due to Pneumoconiosis

To establish entitlement, a claimant must prove by a preponderance of the evidence that he is totally disabled due to pneumoconiosis. A miner is considered totally disabled due to pneumoconiosis if pneumoconiosis is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. §718.204(c)(1). Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it has a material adverse effect on the miner's respiratory or pulmonary condition, or it materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. *Id.* In this case, the preponderance of the evidence did not establish that Claimant has pneumoconiosis or that he is totally disabled. Therefore, the issue of whether the Claimant is totally

disabled due to pneumoconiosis is moot.

Conclusion

The new evidence is essentially cumulative and duplicative of the medical evidence of record previously submitted by the parties, and is not indicative of a change in conditions. Upon review of all of the evidence of record, it has been determined that the previous adjudicators made the correct assessment of the facts, and there has been no mistake in a determination of fact. Consequently, Claimant has established no basis that would require or allow his requested modification, or an award of black lung benefits.

ORDER

Claimant's request for modification and claim for black lung benefits are denied.

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EDWARD TERHUNE MILLER
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. §725.481, any interested party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision and Order by filing a notice of appeal with the **Benefits Review Board, P.O. Box 37601, Washington, D.C. 20013-7601.** A copy of the notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.